FILE COPY

FILED
JAN 24 1931
CHARLES ELMORE CROPLEY
CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1930.

No. 82.

STATE OF ALABAMA, *Petitioner*,
*v.*
THE UNITED STATES.

**On Writ of Certiorari to the Court of Claims.**

## REPLY BRIEF FOR THE PETITIONER.

THOMAS E. KNIGHT, JR.,
*Attorney General of Alabama.*

A. A. EVANS,
*Assistant Attorney General*

CHARLIE C. MCCALL,
*Assistant Attorney General*

OSCAR W. UNDERWOOD, JR.,
H. C. KILPATRICK,
*Of Counsel.*

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

## INDEX.


| | Page |
|---|---|
| Question presented | 1 |
| Statute involved | 2 |
| Summary of Argument | 2 |
| Argument | 2 |


## CITATIONS.

Cases:


| | |
|---|---|
| Bakelite Corporation, Ex parte, 279 U. S. 438 | 12 |
| Camden v. Allen, 26 N. J. L. 398 | 11 |
| Carondelet v. Picot, 38 Mo. 125 | 11 |
| Chandler-Dunbar Water Power Co. v. United States, 229 U. S. 53 | 4 |
| Chappell v. United States, 34 Fed. 673 | 14 |
| Dooley v. United States, 182 U. S. 222 | 13 |
| Goodyear Tire & Rubber Co. v. United States, 276 U. S. 287 | 9 |
| Lane County v. Oregon, 7 Wall. 71 | 11 |
| Liberty Mutual Insurance Co. v. Johnson Shipyards Co., 6 Fed. (2d) 752 | 11 |
| Meriwether v. Garrett, 102 U. S. 472 | 11 |
| Merritt v. United States, 267 U. S. 338 | 9 |
| Monongahela Navigation Co. v. United States, 148 U. S. 312 | 17 |
| Nebraska City v. Gas Co., 9 Nebr. 339 | 11 |
| Perry v. Washburn, 20 Calif. 318 | 11 |
| Peter v. Parkinson, 83 Ohio St. 36 | 11 |
| Phelps v. United States, 274 U. S. 341 | 17 |
| Pierce v. City of Boston, 3 Metc. (Mass.) 520 | 11 |
| Russell v. United States, 182 U. S. 516 | 9 |
| St. Joseph Land Co. v. MacLean, 32 Fed. (2d) 984 | 11 |
| Schillinger v. United States, 155 U. S. 163 | 9, 12 |
| State v. Fleming, 112 Ala. 179 | 11 |
| Sutton v. United States, 256 U. S. 575 | 9 |
| Tempel v. United States, 248 U. S. 121 | 9 |

Page

United States v. Behan, 110 U. S. 338..... 3
United States v. Berdan Fire-Arms Co., 156 U. S. 552 ..... 8
United States v. Chamberlin, 219 U. S. 250.... 11
United States v. Chouteau, 102 U. S. 603..... 16
United States v. Cornell Steamboat Co., 202 U. S. 184 ..... 13
United States v. Emery, Bird, Thayer Realty Co., 237 U. S. 28 ..... 12
United States v. Great Falls Mfg. Co., 112 U. S. 645 ..... 6
United States v. Louisiana, 123 U. S. 32..... 7
United States v. Lynah, 188 U. S. 445..... 5, 17
United States v. Minnesota Investment Co., 271 U. S. 212 ..... 9
United States v. Morgan, 99 Fed. 570..... 14
United States v. Palmer, 128 U. S. 262..... 8
United States v. Salen, 244 Fed. 296..... 16
Wisconsin Cent. R. R. v. United States, 164 U. S. 190 ..... 3

STATUTES:

Judicial Code, Sec. 145 (U. S. C., title 28, Sec. 250—"The Tucker Act")..... 2, 3, 12, 13
Act of February 24, 1855, C. 122, 10 Stat. 612 6
Act of March 3, 1863, c. 92, 12 Stat. 765..... 6
Act of June 3, 1916, c. 134, Sec. 124, 39 Stat. 166, 216 ..... 4

CONGRESSIONAL RECORD AND REPORTS:

House Rep. 1077, 49th Cong., 1st Sess..... 12
Cong. Rec., 49th Cong., 2nd Sess., pp. 2677-8.. 12

MISCELLANEOUS:

Bouvier's Law Dict. (Baldwin's Rev.) p. 263.. 16
8 R. C. L. 420 ..... 16

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1930.

---

No. 82.

---

STATE OF ALABAMA, *Petitioner*,

*v.*

THE UNITED STATES.

---

**On Writ of Certiorari to the Court of Claims.**

---

## REPLY BRIEF FOR THE PETITIONER.

---

### QUESTION PRESENTED.

The question presented in this reply brief is the question whether or not the Court of Claims had jurisdiction of a suit to recover from the United States, which manufactures and sells hydro-electric power at Muscle Shoals in Alabama, a privilege or license tax imposed "upon each person, firm, corporation, agent or officer engaged in the business of manufacturing and selling hydro-electric power in the State of Alabama."

## STATUTE INVOLVED.

Section 145 of the Judicial Code (U. S. C., Title 28, Section 250) provides in part:

> "The Court of Claims shall have jurisdiction to hear and determine the following matters: First: All claims (except for pensions) founded upon the Constitution of the United States or any law of Congress, upon any regulation of an Executive Department, upon any contract, express or implied, with the Government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect of which claims the party would be entitled to redress against the United States either in a court of law, equity or admiralty if the United States were suable: *Provided, however*, That nothing in this section shall be construed as giving to the said court jurisdiction to hear and determine claims growing out of the late civil war, and commonly known as 'war claims', or to hear and determine other claims which, prior to March third, eighteen hundred and eighty-seven, had been rejected or reported on adversely by any court, department, or commission authorized to hear and determine the same."

## SUMMARY OF ARGUMENT.

The State contends that the Court of Claims had jurisdiction of this suit as a claim founded upon an implied contract, as a claim for damages not sounding in tort, and as a claim founded upon the Constitution of the United States.

## ARGUMENT.

The brief of the United States has made no mention of the point of constitutional law presented in

the petitioner's brief, the point which involves the right of the State of Alabama to collect a tax from the United States for manufacturing and selling hydro-electric power within the State. In its brief the United States denies that the Court of Claims had jurisdiction.

The State contends that the remedy is bound up with the right; that if the right exists, Section 145 of the Judicial Code is broad enough to provide the remedy.

In its petition the State alleged that it is entitled to recover upon the basis of an implied contract, and while we understand that the State is not limited to the ground averred in the petition, but may advance other grounds if the facts shown support them (*United States v. Behan*, 110 U. S. 338, 347; *Wisconsin Central R. R. v. United States*, 164 U. S. 190, 212) the State desires to present its argument upon the existence of an implied contract, before presenting two additional grounds which it conceives to be open to it.

There is a strong and appealing analogy in the cases requiring the United States, under an implied contract, to pay for private property which it takes for public use. We do not say that the instant case and those cases are the same, for, this being a case wherein the recovery of a tax is sought, it is one of novel impression; but this case in principle is very like some of those cases, and, what is more important, the facts giving rise to the implied obligation in a number of them were facts of the same character as those which exist here.

At the outset it must be said that the State cannot show any actual course of dealing between the of-

ficers of the State and those of the United States, but such was not necessary in a number of cases involving the taking of private property, and we believe it is not necessary here.

The facts upon which we predicate the implied contract are these: Congress enacted Section 124 of the National Defense Act providing for the construction and maintenance of a plant for the production of nitrates, which plant it was contemplated might be operated with hydro-electric power produced at the site. Congress gave the President the authority to sell the surplus products of the plant, which may have had reference to surplus nitrates only, but may have included all of the surplus products of the operation, including hydro-electric power. But the President had authority to sell the surplus hydro-electric power under the decision in *Chandler-Dunbar Water Power Co. v. United States*, 229 U. S. 53. Congress is presumed to know the Constitution in the same sense that a citizen is presumed to know the law. If a State had the power to tax the sales of any of the surplus products, including surplus hydro-electric power, Congress knew that fact at the time the National Defense Act was enacted, yet Congress did not disavow the right of a State to tax such sales, or seek to circumvent the levying of taxes in connection with such sales. No conditions were imposed upon such sales, and it follows that Congress expected the sales to be normal and usual sales attended by normal and usual consequences. The State, on its part, enacted a revenue measure imposing a uniform tax upon the manufacture and sale of hydro-electric power by any person. It invited anyone, including the United States, to manufacture and sell hydro-electric power within its borders, sub-

ject only to the payment of the tax. The plant and dam having been located in Alabama, the President manufactured and sold the surplus hydro-electric power. Thus, the United States manufactured and sold hydro-electric power expecting to pay a tax for the privilege of so doing, and the State, knowing that the United States was manufacturing and selling the power, expected to collect its privilege tax. Therefore, the one exercised the privilege, expecting to pay a tax for it, and the other granted the privilege, expecting to collect a tax for it, and the obligation of the United States to pay is contractual.

If the implied contract outlined here be considered tenuous, that criticism may be directed in equal measure against the implied contracts which have been found in numerous cases. Thus, in *United States v. Lynah*, 188 U. S. 445, a case arising under the Tucker Act in a Circuit Court under jurisdiction concurrent with the Court of Claims, an implied contract was found for paying for plantation land the practical use of which was destroyed through the raising of a river level about eighteen inches, as an incident to a navigation project, so that the drainage system was rendered ineffectual (468-469). In the *Lynah* case the Congressional authority was a series of appropriation acts for improving navigation on the Savannah River (466). There was obviously no course of dealing between the owners and the Government. There was no direction to take the particular property, but a direction to do that which resulted in the taking. There was no protest, but the lack of protest was deemed an assent to the appropriation by the Government (467). The Government did not deny the ownership of the plaintiff, and there was no

condemnation proceeding instituted, and no attempt in terms was made to take the title; but, nevertheless, it was held that if the acts done by the officers of the United States under the direction of Congress resulted in such injury as to render the land absolutely valueless, the property was, in contemplation of law, taken, and judgment might be rendered against the Government for the value of the property (468).

In *United States v. Great Falls Manufacturing Company*, 112 U. S., 645, 656, Congress had authorized the taking of lands for the construction of a water service system for the City of Washington, but the Act of Congress had not specifically ordered the petitioner's land to be taken. However, it was held that the making of the improvements necessarily involved the taking of the property, and if, for want of formal condemnation proceedings, the claimant was entitled, at the beginning of the work, to have the agents of the Government enjoined from prosecuting it until provision was made for securing compensation, there was no sound reason why the claimant might not waive that right, and, electing to regard the action of the Government as a taking under power of eminent domain, demand just compensation. This was a case decided before the Tucker Act was passed, but while the Act of February 24, 1855 (c. 122, 10 Stat. 612), as amended by the Act of March 3, 1863 (c. 92, 12 Stat. 765), was in effect, which gave jurisdiction to the Court of Claims upon contracts express or implied.

References to cases of this kind might be multiplied, but enough has been said to show that the contractual element in the implied contracts thus found depends upon a very slender fiction. The paramount

fact in these cases was that property had been taken which was acknowledged to belong to a private owner. Common justice, and the duty of the Government to grant compensation as required by the Constitution, supplied all but a fraction of the causes of action which were recognized.

So in this case, if it should be found that the State has the right to tax the United States for manufacturing and selling hydro-electric power, a cause of action, springing from the constitutional duty of the United States to pay the tax to the State, and based upon implied contract and within the terms of the Judicial Code, could logically be found, even though the contractual element be as slight as it was in the cases cited.

In *United States v. Louisiana,* 123 U. S. 32, this Court held that the forum of the Court of Claims is open to the States as well as to individual citizens. There was no suggestion in that decision that States before the Court of Claims may present only those causes of action which are of the classes inhering ordinarily in individuals. States have property rights which are peculiar to their character as governments. Individual citizens do not have the power to tax, but States have that power. If the doors of the Court of Claims are opened to the States at all it seems proper that they should be allowed to come in with the causes of action which are peculiar to them, as well as with those which are common with citizens, provided their peculiar causes of action are of the general types found within the four corners of Section 145 of the Judicial Code. The novelty, if there be a novelty, is the finding that States may enter the Court, not that some of their rights differ

in genesis, if not in essence, from those of ordinary citizens.

But the right to tax may not differ substantially from rights which appertain to individual citizens. A State, having the monopoly of taxation in its own field, in collecting a privilege tax exacts a toll from those who are given the franchise to exercise the privilege. A patentee, having a similar monopoly in the field of his own invention, collects a toll from those who are given the franchise to use his invention. This Court has held that when the United States has used a patentee's improvement with his consent, and with the expectation on his part of receiving compensation for the license, an implied contract for compensation arises. *United States v. Palmer,* 128 U. S. 262, 269. Also in *United States v. Berdan Fire-arms Company,* 156 U. S. 552, 567-568, where the findings were not very specific and emphatic as to the assent of the Government to the terms of any contract, they were held sufficient although they were largely negative in character, namely: that there was no denial of the patentee's rights to the invention, no assertion on the part of the Government that the patent was wrongfully issued, no claim of a right to use the invention regardless of the patent, no disregard of the claims of the patentee, and no use contrary to protest. The Government used the invention with the permission of the owner, and did not, when using it, repudiate his title. An implied contract found by the Court of Claims was upheld.

This explanation shows that while there are no precedents for a cause of action in which taxes due to a State are claimed, yet in essence such a claim

is of the same character as claims by private citizens which have been sustained by this Court.

The cases cited by the United States on pages 5 and 7 of its brief are not, in our opinion, applicable to the situation presented in the instant case. Those cases involved either claims clearly based upon torts (*Schillinger v. United States,* 155 U. S. 163; *Russell v. United States,* 182 U. S. 516; *Tempel v. United States,* 248 U. S. 121); or based upon work done by mistake in excess of the appropriation, and hence without authority of law, so that no contract, either express or implied could validly be made (*Sutton v. United States,* 256 U. S. 575); or were cases where the court found that there was no meeting of minds and therefore that the action was not based upon contract express or implied (*United States v. Minnesota Investment Company,* 271 U. S. 212; *Merritt v. United States,* 267 U. S. 338; *Goodyear Tire & Rubber Company v. United States,* 276 U. S. 287). It is true that in the three cases last cited the Court said that jurisdiction could not be given to the Court of Claims upon contracts implied in law, which might have been binding between private parties. However, in the *Minnesota Investment Company* case it is to be noted that the United States through its Comptroller General claimed as its own the interest accruing on a deposit by a litigant with the clerk of a United States Court, which under a court rule would belong to the litigant, and therefore it denied the title of the plaintiff to the money in question. Manifestly, there could be no meeting of minds under such circumstances. Also, in the *Merritt* case the plaintiff was a subcontractor under one who had contracted with the United States, and, the contractor having

made a fraudulent settlement, the United States exacted a sum of money from the contractor which the plaintiff contended should go to him, but which, for aught that was shown, was not exacted by the Government for his benefit, but was exacted as a penalty under a law which gave the United States such a right in case of fraud. In the *Goodyear* case, where the United States held over in its occupancy of premises into a fiscal year for which there was an appropriation available, but after giving notice that there was no intention to pay rent for a period beyond the actual period of occupancy, the United States was not held liable for rent for the full fiscal year, although a holding over might have been binding between private parties under the State law; but, as the Court pointed out, under applicable federal statutes the United States cannot be bound in that way, and the notice given by the Government negatived any intention to be bound.

In the instant case we are not asserting a contract implied in law, but a contract implied in fact, namely, implied from the facts that the United States manufactured and sold the power knowing the meaning of the Constitution, and therefore expecting to pay the tax, and that the State permitted the manufacture and sale expecting to collect the tax. These facts, in our view, are sufficient to constitute a convention between the parties and a coming together of minds.

There are, no doubt, numerous instances in which, between private parties, contracts are implied in law. Common among them are cases where tortious injuries have been committed, but where the plaintiff follows the common law practice of waiving the tort and suing in assumpsit. There is no semblance of

a tort in this case, and no basis for an assertion that the State is attempting to waive a tort and sue on such an implied contract.

We do not believe the cases cited on page 6 of the Government's brief are either controlling or persuasive in the instant case. In the cases of *Camden v. Allen,* 26 N. J. L. 398, *Nebraska City v. Gas Company,* 9 Nebr. 339, *Pierce v. City of Boston,* 3 Metc. (Mass.) 520, and *Carondelet v. Picot,* 38 Mo. 125, the opinions stated that where a remedy for the collection of taxes is given by statute it is exclusive, and resort may not be had to a personal action against the taxpayer. This is not the rule in Alabama, where taxes may be collected by a personal action in debt or assumpsit unless the taxing statute makes the statutory remedy exclusive. *State v. Fleming,* 112 Ala. 179. This is also the federal rule. *United States v. Chamberlin,* 219 U. S. 250, 262.

In *Nebraska City v. Gas Company, supra,* the Court said that taxes do not arise upon contract either express or implied; in *Pierce v. City of Boston, supra,* it was said that taxes are not contracts between party and party, either express or implied; and in *St. Joseph Land Company v. MacLean,* 32 Fed. (2d) 984, it was said that taxes are in no sense contractual; but those statements were in each case by way of dictum and not necessary to the conclusions reached. In *Perry v. Washburn,* 20 Calif. 318, *Peter v. Parkinson,* 83 Ohio St. 36, *Lane County v. Oregon,* 7 Wall. 71, *Meriwether v. Garrett,* 102 U. S. 472, and *Liberty Mutual Insurance Company v. Johnson Shipyards Company,* 6 Fed. (2d) 752, the decisions did not go this far, but by way of dictum they stated that taxes are not debts.

After having examined the legislative history of the Tucker Act of March 3, 1887, we are convinced that the Tucker Act was not intended to have any reference to common law forms of action. While the Tucker Bill was before the House it covered all classes of claims against the United States, with a few unimportant exceptions, and it covered claims in tort. The Senate eliminated claims sounding in tort by inserting the phrase "in cases not sounding in tort" as it now appears in the first paragraph of Section 145 of the Judicial Code. The legislative history shows not only that the Tucker Act was a great act of justice, which should not be strictly construed, (*United States v. Emery, Bird, Thayer Realty Company*, 237 U. S. 28, 32) but was a means whereby Congress intended to relieve itself of a great body of petitions which could better be attended to by a court of justice (*House Report 1077*, 49th Cong., 1st Session, page 3; *Cong. Rec.*, 49th Cong., 2nd Session, pages 2677-8). See also *Ex parte Bakelite Corporation*, 279 U. S. 438, 452.

We must show that our cause of action is one of those embraced within the Tucker Act, but that Act is certainly broad and covered a much wider scope than previous statutes which set forth the jurisdiction of the Court of Claims (see *Schillinger v. United States, supra* 166-167, in which previous acts covering the Court of Claims are quoted). If the State has the constitutional right to tax the United States, a suit in the Court of Claims for the recovery of the tax, rather than a suit for injunction against Government officers followed by a petition to Congress, is within what we understand to have been the contemplation of Congress in enacting the Tucker Act.

So much for our contention that the State has the right to recover as upon an implied contract. Two additional bases for recovery seem to be provided.

In its brief the United States apparently takes the position that the Court of Claims has jurisdiction only in cases where the claim is founded on a contract, either express or implied. However, it is to be noted that the first section of the Tucker Act, now embodied in Section 145 of the Judicial Code, contemplates four distinct classes of cases, the fourth class being "claims for damages, liquidated or unliquidated, in cases not sounding in tort." *Dooley v. United States*, 182 U. S. 222, 224. Decisions in cases of this fourth general class have been few, possibly for the reason that there are very few situations under which an action for damages will lie, in the absence of contract, and where no tort is involved.

In *United States v. Cornell Steamboat Company*, 202 U. S. 184, the petitioner's ship saved a cargo of sugar on another ship upon which duties had already been collected by the United States. The revenue law then provided that where cargoes were destroyed upon which duties had already been paid the duties should be refunded. Therefore, in saving the cargo the petitioner saved the Government from repaying duties, and in this case salvage on those duties was claimed. The United States contended that no contract express or implied could be found, and that suit might not be brought under the Tucker Act (185-186). The plaintiff contended that an implied contract grew out of the successful event of the service (188). The Court, however, held that, while salvage might be based on contract where the service was re-

quested, in this case the United States knew nothing about the service until after the service had been rendered (194); that in this case the claim was one for damages not sounding in tort, and recovery could be had (190).

In the case of *United States v. Morgan,* 99 Fed. 570, the Circuit Court of Appeals for the Fourth Circuit considered the nature of an action for salvage brought against the United States by the master of a ship which had come to the assistance of a United States light ship in distress and had towed it into port. After reciting the provisions of the Tucker Act, the Court said (571-2):

> "The first question is, is it a claim for salvage upon a contract, express or implied, or is it a claim for damages liquidated or unliquidated in a case not sounding in tort, in respect of which claim the party would be entitled to redress against the United States in a court of admiralty, if the United States were suable? If it be either, the Court has jurisdiction * * * Salvage clearly is not a tort."

The Court did not expressly find that this was a claim based upon an implied contract, saying that it made no difference whether it were that kind of a claim or a claim for damages not sounding in tort, but the Court's recognition of the latter as a separate class of claims cognizable under the Tucker Act is manifest.

In *Chappell v. United States,* 34 Fed. 673, the facts were these: The United States light-house board, acting under authority of Congress, erected two light houses as range lights to enable vessels to direct their course. For that purpose it was necessary that

there be no intervening objects between the light houses. The land of the plaintiff lay between the two lights, and the Government required of him that he keep the space intervening between the two lights free of buildings. He sued for compensation for the use of his land. A demurrer was interposed on the grounds, first, that the petition did not allege facts from which a contract, express or implied, could be deduced, and second, that the mere passing of light across the plaintiff's land could not be held to be a use of it, and that if he yielded to the directions of the federal officers not to obstruct the line of range he voluntarily consented to do what he could not be required to do and had no remedy at law. The Court, after reviewing the provisions of the Tucker Act, said (674, 675):

> "Under this law, which is broader in its terms than that by which heretofore claims against the United States were cognizable in the Court of Claims, if the plaintiff has suffered damage by being prevented from using his land, and he has properly stated his case, and that case as stated is not one sounding in tort, we do not see that upon the ground of jurisdiction his petition is demurrable * * * In requiring that the plaintiff should desist from building on his intervening land, the officers of the light-house board were doing a lawful and authorized act * * * It cannot be said therefore that their act was tortious * * * We are of opinion that the amended petition does state a case from which a promise to make compensation may be implied, or at any rate *it states a case not sounding in tort, entitling the plaintiff to recover any damages he may be able to prove have been sustained by him.*" (Italics supplied.)

Anyone exercising a privilege in Alabama which is subject to tax is obligated to pay the tax to the State. If the State has the right to collect the tax from the United States then the United States is likewise obligated to pay the tax to the State. The word "damages" is one of the broadest possible definition. It means "the indemnity recoverable by a person who has sustained an injury, either in his person, property, or relative rights, through the act or default of another." *Bouvier's Law Dict.* (*Baldwin's Revision*) p. 263. "Damages may properly be defined as the pecuniary compensation, recompense, or satisfaction for an injury sustained, or, as otherwise expressed, the pecuniary consequences which the law imposes for the breach of some duty or the violation of some right." 8 R. C. L. 420. Furthermore, there is no novelty in claiming taxes under the score of damages. *United States v. Chouteau,* 102 U. S. 603; *United States v. Salen,* 244 Fed. 296. There is no element of tort present here, and so the claim would clearly be one for damages not sounding in tort, even if it should be held that the claim is not founded upon a contract.

But there is still another ground for a finding that the Court of Claims has jurisdiction: namely, a finding that this claim is one founded upon the Constitution of the United States. This also was a ground of jurisdiction new to the Tucker Act, and it has been given interpretation only in cases involving takings of property referable to the Fifth Amendment to the Constitution. Obviously, however, this provision of the Tucker Act is not limited to claims referable to the Fifth Amendment, else Congress in enacting the Tucker Act would have made such a

limitation. In our view, this provision covers claims under the Tenth Amendment to the Constitution as well as those under the Fifth Amendment. The Fifth Amendment is only one of the constitutional limitations to which the United States is subject. *Monongahela Navigation Company v. United States*, 148 U. S. 312, 336. By the Tenth Amendment the inherent sovereign power of the State to collect taxes is reserved and is acknowledged, as clearly as if that power were specifically mentioned in the Amendment, so the power of the State to collect taxes is as much a part of the Constitution as is the Fifth Amendment.

Mr. Justice Brown in his concurring opinion in *United States v. Lynah, supra*, 474-477, disagreed with the main opinion in which an implied contract was found, and took the view that the claim was one founded upon the Constitution, stating that claims founded upon the Constitution might be prosecuted in the Court of Claims whether sounding in contract or in tort. Two of his colleagues concurred in his view that the claim was founded upon the Constitution, but also took the view that it was based upon an implied contract, as was held in the main opinion (479). In *Phelps v. United States*, 274 U. S. 341, it was held that while the right to just compensation for the use of private property gave the owner a claim founded upon the Fifth Amendment, it was also one arising out of implied contract (343), and an amount equivalent to interest as a part of just compensation might be allowed notwithstanding Section 177 of the Revised Statutes, which prohibits the granting of interest by the Court of Claims, except where the same has been by contract specifically provided for (343-344).

This claim is unusual in that a State is attempting to recover taxes from the United States. In essence, however, as we have shown, the claim is very like the claims of private individuals which have been adjudicated by the Court of Claims. Furthermore, while the State, in contending that the claim will lie as a claim for damages not sounding in tort and as a claim founded upon the Constitution, is able to cite very few precedents, those grounds are set out precisely in the Tucker Act, and the fact that they have been infrequently availed of does not detract from their power. It seems, therefore, that if the Court should find that the State of Alabama has the right to collect the tax, the grounds for sustaining jurisdiction are more than ample.

Respectfully submitted,

THOMAS E. KNIGHT, JR.,
*Attorney General of Alabama.*

A. A. EVANS,
*Assistant Attorney General*

CHARLIE C. MCCALL,
*Assistant Attorney General*

OSCAR W. UNDERWOOD, JR.,
H. C. KILPATRICK,
*Of Counsel.*

FILED
MAY 28 1930
CHARLES ELMORE CROPLEY
CLERK

FILE COPY

No. 82

# In the Supreme Court of the United States

OCTOBER TERM, 1929

THE STATE OF ALABAMA, PETITIONER

*v.*

THE UNITED STATES

*ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS*

## MEMORANDUM FOR THE UNITED STATES

# INDEX


| | Page |
|---|---|
| Opinion below | 1 |
| Jurisdiction | 1 |
| Question presented | 1 |
| Statutes involved | 2 |
| Statement | 2 |
| Argument | 3 |
| Conclusion | 6 |
| Appendix | 7 |


## CITATIONS


| | |
|---|---|
| **Cases:** | |
| *Camden* v. *Allen*, 26 N. J. L. 398 | 5 |
| *Carondelet* v. *Picot*, 38 Mo. 125 | 5 |
| *Gillespie* v. *Oklahoma*, 257 U. S. 501 | 3 |
| *Lane County* v. *Oregon*, 7 Wall. 71 | 5 |
| *Liberty Mut. Ins. Co.* v. *Johnson Shipyards Corp.*, 6 F. (2d) 752 | 5 |
| *Meriwether* v. *Garrett*, 102 U. S. 472 | 5 |
| *Nebraska City* v. *Gas Company*, 9 Nebr. 339 | 5 |
| *Perry* v. *Washburn*, 20 Cal. 318 | 5 |
| *Perry County* v. *Selma M. & M. R. Co.*, 65 Ala. 391 | 5 |
| *Peter* v. *Parkinson, Treasurer*, 83 Ohio St. 36 | 5 |
| *Pierce* v. *City of Boston*, 3 Metc. 520 | 5 |
| *St. Joseph Land Co.* v. *MacLean*, 32 F. (2d) 984 | 5 |
| *Schillinger* v. *United States*, 155 U. S. 163 | 4 |
| *South Carolina* v. *United States*, 199 U. S. 437 | 3 |
| *United States* v. *Louisiana*, 123 U. S. 32 | 4 |
| **Statutes:** | |
| Judicial Code, sec. 145 (U. S. C., title 28, sec. 250) | 7 |
| National defense act, sec. 124 (c. 134, 39 Stat. 166, 215) | 8 |
| General Acts of Alabama, 1927, p. 139 | 10 |
| **Text:** | |
| Cooley's Treatise on Taxation (fourth edition 1924), section 22 | 4 |

# In the Supreme Court of the United States

OCTOBER TERM, 1929

No. 817

THE STATE OF ALABAMA, PETITIONER

*v.*

THE UNITED STATES

*ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS*

## MEMORANDUM FOR THE UNITED STATES

### OPINION BELOW

The opinion of the Court of Claims (R. 9) has not yet been reported.

### JURISDICTION

The judgment of the Court of Claims was entered on March 12, 1930. (R. 30.) The petition for a writ of certiorari was filed on April 15, 1930. (R. 30.) The jurisdiction of this Court is invoked under Section 3 (b) of the Act of February 13, 1925.

### QUESTION PRESENTED

Whether the State of Alabama can recover in the Court of Claims from the United States, which manufactures and sells hydroelectric power at